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In the Supreme Court of the United States

OCTOBER TERM, 1997

CEASAR WRIGHT, PETITIONER,

v.

UNIVERSAL MARITIME SERVICE CORP., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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36 pp

QUESTION PRESENTED

Whether a general arbitration clause in a collective bargaining agreement bars an employee covered by the contract from filing his own lawsuit under a federal anti-discrimination statute.

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case presents the question whether an individual can be compelled to arbitrate a statutory claim of discrimination under the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* (ADA), pursuant to an arbitration clause in a collective bargaining agreement. Although this case involves a claim under the ADA, the decision of this Court is likely to affect similar cases arising under other federal statutes, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* (ADEA). The Attorney General is

responsible for enforcing Title VII and the ADA with respect to public employers. See 42 U.S.C. 2000e-5(f)(1) (Title VII); 42 U.S.C. 12117(a), 12188(b) (ADA). The Equal Employment Opportunity Commission (EEOC) has authority to enforce Title VII and the ADA with respect to private employers and the ADEA with respect to both public and private employers. See 42 U.S.C. 2000e-5(a) (Title VII); 42 U.S.C. 12117(a) (ADA); 29 U.S.C. 626, 633a (ADEA).

STATEMENT

1. Petitioner Ceasar Wright was employed as a longshoreman in Charleston, South Carolina, from 1970 to 1992. On February 18, 1992, petitioner was injured at work. Petitioner filed a claim for disability benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq*. Petitioner eventually settled the claim with his employer, Stevens Shipping Company. Pet. App. 3a.

On January 2, 1995, petitioner appeared at the hiring hall of Local 1422 of the International Longshoreman's Association (ILA), seeking work. At the time, petitioner's physician stated that petitioner's condition had improved to the point that he could return to full duty. From January 2 through January 11, 1995, the union referred petitioner to four different stevedoring contractors. Initially, none of the companies objected to petitioner's work. Once the companies learned, however, that petitioner had settled a claim for disability, they mutually agreed not to employ petitioner and informed the union that petitioner would no longer be accepted for job referral. Pet. App. 3a.

Petitioner's employment as a longshoreman was subject to a collective bargaining agreement (CBA) between the ILA and a number of individual employers represented by the South Carolina Stevedores Association. Pet. App. 2a.

Under the CBA, the union is permitted to pursue a grievance on behalf of a union member. The CBA's grievance and arbitration procedures apply to "all matters affecting wages, hours, and other terms and conditions of employment." *Id.* at 4a . The CBA also states that "[i]t is the intention and purpose of all the parties hereto that no provision or part of this Agreement shall be violative of any Federal or State law." *Id.* at 17a.

Under the CBA, the union, as a precondition to pursuing a grievance, must initially attempt to resolve the dispute through informal discussions with the employer. Pet. App. 15a There are three stages that follow. If the informal discussions fail, the claim must be submitted within 48 hours to the grievance committee. *Id.* at 15a-16a. If that committee cannot resolve the matter, the grievance may be referred to a second grievance committee. *Id.* at 16a n.1. If the dispute cannot be resolved by the second grievance committee, the grievance may be referred to third-party arbitration. *Ibid.*

When petitioner learned of the companies' refusal to accept him for employment, he promptly contacted his union representative. Pet. App. 21a-22a. The union sought to resolve the matter informally, but it was unable to do so. *Id.* at 16a. The union did not initiate a formal grievance under the CBA and did not invoke the arbitration procedure specified by the CBA. *Ibid.* Instead, the union representative informed petitioner that he should pursue a statutory claim under the ADA. *Id.* at 3a.

2. In January 1996, petitioner filed suit under the ADA, alleging disability discrimination. Pet. App. 20a. Petitioner named respondents—the South Carolina Stevedores Association and the individual companies that had mutually decided not to employ petitioner—as defendants. *Ibid.* Respondents moved for summary judgment, arguing that petitioner's suit should be dismissed because he was re-

quired to pursue his statutory claim of discrimination under the grievance and arbitration procedures of the CBA.

Based on a magistrate's report recommending dismissal, Pet. App. 19a-26a, the district court granted respondents' motion. *Id.* at 6a-13a. The court agreed with respondents that the case was controlled by the Fourth Circuit's decision in *Austin* v. *Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), cert. denied, 117 S. Ct. 432 (1996). In that case, the Fourth Circuit, relying on *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), ruled that an individual is precluded from pursuing his or her statutory claim of discrimination in federal court, as an original matter, if that individual is subject to a CBA that contains an arbitration provision purporting to cover such employment disputes. Citing the "overriding federal policy favoring arbitration," the district court in this case concluded that petitioner's complaint "was subject to mandatory arbitration under the terms of the bargaining agreement and, thus, that [the district] court lacks jurisdiction to hear the case." Pet. App. 8a-9a.

3. On appeal, the Fourth Circuit affirmed in an unpublished opinion that relied heavily on *Austin*. Pet. App. 2a-5a. The court of appeals observed that, "[i]n *Austin*, this court established that collective bargaining agreements to arbitrate employment disputes are binding upon individual employees even when the dispute involves a federal cause of action." *Id.* at 4a. The court stated that, "under *Austin*, the only issue in this case is whether there was an agreement to arbitrate ADA claims in the CBA." *Ibid.* The court determined that the language of the CBA referring to "all matters affecting wages, hours, and other terms and conditions of employment * * * easily encompasses [petitioner's] ADA claim," thus mandating arbitration of the claim under the provisions of the CBA. *Id.* at 4a-5a.

SUMMARY OF ARGUMENT

This case is squarely controlled by *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). This Court in *Alexander* held that an arbitration provision in a collective bargaining agreement does not preclude an aggrieved individual from pursuing his or her statutory anti-discrimination claim in federal court. The holding in *Alexander* applies directly to this case and permits petitioner to pursue his statutory remedy.

The Fourth Circuit declined to follow *Alexander* and its progeny on the basis of its own prior ruling that *Alexander* had been rendered inapplicable by this Court's decision in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In *Gilmer*, however, the Court held that an employee who entered into a valid *individual* agreement to arbitrate disputes could be barred by that agreement from bringing a claim under a federal anti-discrimination statute in federal court. *Gilmer* did not involve union representation, a collective bargaining agreement or, indeed, a contract of employment at all. See *id.* at 25 n.2. Far from overruling *Alexander*, the Court in *Gilmer* explained that the *Alexander* holding was inapplicable to the facts before it for several reasons, none of which is applicable here.

Gilmer drew a critical distinction between commitments to arbitrate that are embodied in collective bargaining agreements, as in *Alexander*, which create a "tension between collective representation and individual statutory rights," 500 U.S. at 35, and commitments to arbitrate that are embodied in individual contracts, as in *Gilmer*. Because the federal antidiscrimination statutes protect "not majoritarian processes, but an individual's right to

equal employment opportunities," *Alexander*, 415 U.S. at 51, the vindication of that right can be committed to arbitration only by an individual contract, as in *Gilmer*, and not by a collective bargaining agreement. The individual employee's ability to vindicate a federal antidiscrimination claim cannot be made to depend on a union's judgment about the collective best interests of its employees, either at the time of negotiating an arbitration clause in the CBA, or at the time of presenting or compromising a particular claim. In short, as *Alexander* and subsequent cases recognized, and *Gilmer* reaffirmed, it would be inconsistent with the purposes of the federal antidiscrimination statutes to permit a union to control the means of vindicating an individual's rights under those statutes.

Provisions in federal antidiscrimination statutes encouraging the use of methods of alternative dispute resolution, including arbitration "[w]here appropriate and to the extent authorized by law," 42 U.S.C. 12212, do not require a different conclusion. When Congress enacted those provisions, Congress was aware of this Court's unbroken line of decisions making clear that arbitration of a claim of discrimination is not "appropriate" or "authorized by law" if the individual making the claim has never agreed to waive the federal judicial remedies created by the statute under which the individual's claim is brought. The legislative history of these provisions makes clear that Congress intended to apply and not repudiate the holding of *Alexander*. Accordingly, although these provisions favor arbitration agreements entered into knowingly and voluntarily by an individual employee, they have no bearing on the question whether a collective bargaining agreement may waive an employee's substantive or procedural rights under a federal antidiscrimination statutes.

ARGUMENT

AN ARBITRATION CLAUSE IN A COLLECTIVE BARGAINING AGREEMENT DOES NOT BAR AN EMPLOYEE COVERED BY THE AGREEMENT FROM FILING HIS OWN LAWSUIT UNDER A FEDERAL ANTIDISCRIMINATION STATUTE

A. This Case Is Controlled By This Court's Decision In *Alexander* v. *Gardner-Denver*, Which Holds That An Arbitration Provision In A Collective Bargaining Agreement Does Not Preclude An Individual Employee From Pursuing A Judicial Remedy Under An Antidiscrimination Statute

1. This case is directly controlled by this Court's decision nearly 25 years ago in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). In *Alexander*, an employee subject to a collective bargaining agreement was discharged from his job and alleged that the discharge was the result of race discrimination by the employer. *Id.* at 38, 42. The collective bargaining agreement established a grievance and arbitration procedure and expressly prohibited "discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry." *Id.* at 39. The plaintiff's union invoked the grievance and arbitration procedure, but the arbitrator ruled that the employee had been discharged for "just cause." *Id.* at 42-43. The employee then brought suit against the employer under Title VII. *Id.* at 43. The employer argued that the employee was bound by the arbitration procedure established under the CBA and thus precluded from seeking a judicial remedy under Title VII.

This Court held that the employee was entitled to pursue his statutory claim in court, notwithstanding the arbitration procedure established under the CBA. The Court rejected the argument that the employee had for-

feited his cause of action in federal court under Title VII by electing the remedy of arbitration instead. 415 U.S. at 49-50. The Court also rejected the suggestion "that [the employee] waived his cause of action under Title VII" by pursuing arbitration. *Id.* at 51. The Court acknowledged "that a union may waive certain statutory rights related to collective activity, such as the right to strike," because those "rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members." *Id.* at 51. The Court explained, however, that "Title VII * * * stands on plainly different ground," because "it concerns not majoritarian processes, but an individual's right to equal opportunities." *Ibid.* Therefore "the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII." *Ibid.*

2. The Court's holding in *Alexander* is sufficient to dispose of this case. As in *Alexander*, petitioner suffered an adverse employment decision that he believed was discriminatory in violation of a federal antidiscrimination statute. Although the employee's claim in *Alexander* arose under Title VII and petitioner's claim arose under the ADA, there is no difference between the statutes relevant to the *Alexander* analysis. See, *e.g.*, 42 U.S.C. 12117(a) (Title VII enforcement "powers, remedies, and procedures" apply to ADA). As in *Alexander*, petitioner was subject to a collective bargaining agreement that established a grievance procedure that would lead ultimately to binding arbitration for employment-related disputes. See 415 U.S. at 40. Therefore, this Court's conclusion in *Alexander* that the collective bargaining agreement could not and did not waive the employee's right to a federal

court remedy under Title VII is equally applicable to this case. The Fourth Circuit erred in refusing to follow *Alexander*.[1]

Alexander cannot be distinguished on the ground that the employee in *Alexander* first proceeded through arbitration, while petitioner did not. To the contrary, like the employee in *Alexander*, petitioner here invoked his contractual remedies and took them as far as he could, *i.e.*, until the union informed him that it would not pursue them further. Moreover, *Alexander* does not in any way rest on a determination that the employee had exhausted his contractual remedies. Instead, the holding in *Alexander* is squarely based on the conclusion that the employee's rights to proceed in federal court had not been—and could not be—waived by a collective bargaining agreement. Only after holding that such a waiver would be ineffective, see 415 U.S. at 51, did the Court go on to consider whether "[t]he actual submission of [the employee's] grievance to arbitration * * * alter[s] the situation," see 415 U.S. 52, and to decide that it does not. This Court's later holding in *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976), makes the point clear. Relying on *Alexander*, see 429 U.S. at 236, 238, the Court held in that case that pursuit of a contractual arbitration remedy does not toll Title VII's time limits. That holding would be inconsistent with a ruling that the employee must nonetheless pursue a contractual

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[1] See *Agostini* v. *Felton*, 117 S. Ct. 1997, 2017 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Rodriguez* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam).

grievance and arbitration process and thereby risk losing the right to a judicial remedy under Title VII.

3. This Court has applied the principle of *Alexander* not only in *Electrical Workers*, but also in two other succeeding cases. In each case, the Court held that the creation of a grievance and arbitration procedure under a collective bargaining agreement, or even the invocation of such a procedure by the employee, does not alter an employee's ability to pursue a private right of action created under a federal statutory scheme. See, *e.g.*, *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (claim brought under Fair Labor Standards Act); *McDonald* v. *City of West Branch*, 466 U.S. 284, 292 (1984) (claim brought under 42 U.S.C. 1983).[2] Those decisions reaffirm the *Alexander* principle in other contexts. The court of appeals' decision in this case and its prior decision in *Austin* therefore conflict with the reasoning of these other cases as well.

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[2] While these cases involve suits under statutes other than the antidiscrimination statutes at issue in *Alexander* and in this case, the same principles apply. In each case, this Court concluded that Congress designed the federal statutory scheme "to provide minimum substantive guarantees to individual workers," *Atchison, Topeka, & Santa Fe Ry.* v. *Buell*, 480 U.S. 557, 565 (1987), which "could not be avoided by a contractual agreement," *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 213 n.8 (1985). For that reason, the purported waiver of an individual's statutory rights or of the means to enforce those rights in a collective bargaining agreement was held ineffective in these cases as in *Alexander*. The same analysis applies here.

B. This Court's Decision In *Gilmer* Reaffirms That An Individual's Federal Statutory Antidiscrimination Claim Cannot Be Waived In A Collective Bargaining Agreement

The court of appeals in this case declined to follow *Alexander* in reliance on its own previous holding in *Austin* that an arbitration procedure in a collective bargaining agreement precluded a statutory antidiscrimination claim in federal court. In *Austin*, the Fourth Circuit appears to have concluded that this Court's decision in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), had undercut the authority of *Alexander* in cases like this, where a collective bargaining agreement provides for an exclusive grievance and arbitration procedure for resolving workplace disputes.[3] That conclusion was mistaken.[4]

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[3] The Fourth Circuit has continued to recognize the authority of *Alexander* in cases in which the collective bargaining agreement expressly limits arbitration to disputes "growing out of the interpretation or application of any of the terms of [the CBA]" and thereby deprives the arbitrator of authority to decide a purely statutory claim. *Brown* v. *TWA*, 127 F.3d 337, 341 (4th Cir. 1997).

[4] Every other court of appeals to have addressed the issue since *Gilmer* has concluded that *Alexander* continues to preclude waiver in a collective bargaining agreement of an individual's substantive or procedural rights under federal antidiscrimination statutes. See, *e.g.*, *Penny* v. *United Parcel Serv.*, 128 F.3d 408, 411-14 (6th Cir. 1997); *Brisentine* v. *Stone & Webster Eng'g Corp.*, 117 F.3d 519, 525-27 (11th Cir. 1997); *Harrison* v. *Eddy Potash, Inc.*, 112 F.3d 1437, 1452-54 (10th Cir. 1997); *Pryner* v. *Tractor Supply Co.*, 109 F.3d 354, 365 (7th Cir.), cert. denied, 118 S. Ct. 294 (1997); *Varner* v. *National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), cert. denied, 117 S. Ct. 946 (1997); see also *Tran* v. *Tran*, 54 F.3d 115 (2d Cir. 1995) (reaching the same conclusion with respect to claims under the Fair Labor Standards Act), cert. denied, 517 U.S. 1134 (1996).

In *Gilmer*, this Court held that a claim of discrimination under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application. The plaintiff in *Gilmer* was an account representative at a securities firm; he was not represented by a union and he was not covered under a collective bargaining agreement. In an application to register with the New York Stock Exchange, he agreed to arbitration of "[a]ny controversy between a registered representative and any [Stock Exchange] * * * member organization arising out of the employment or termination of employment of such registered representative." 500 U.S. at 23. This Court held that the agreement to arbitrate was enforceable.

Like the plaintiff in the present case, the plaintiff in *Gilmer* argued, *inter alia*, that *Alexander*, *Barrentine*, and *McDonald* established that federal statutory antidiscrimination claims could not be effectively vindicated in an arbitral forum, and that therefore a judicial remedy for such claims would not be precluded by the arbitration agreement. See 500 U.S. at 33. This Court rejected that argument, but it did not do so by overruling *Alexander* or the succeeding cases. Instead, it explained that there were critical distinctions that rendered the holding of *Alexander* inapplicable to the facts of *Gilmer*. Because those distinctions are inapplicable here, the holding of *Alexander* controls this case.[5]

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[5] The Court in *Gilmer* criticized the view expressed in *Alexander* "that arbitration was inferior to the judicial process for resolving statutory claims." 500 U.S. at 34 n.5, noting that such "mistrust of the arbitral process * * * has been undermined" by the Court's more recent decisions. *Ibid*. The Court did not, however, overrule *Alexander*. Instead, as we discuss in the succeeding portion of this brief, the Court explained that "[t]here are several important distinctions between the *Gardner-Denver* line of cases and the case before us," which established that "those cases provide no basis for refusing to enforce Gilmer's agreement to arbitrate his ADEA claim." *Id.* at 35. Had the Court believed that *Alexander* was no longer good law, this entire portion of the opinion would have been unnecessary. See *Brisentine* v. *Stone & Webster Engineering Corp.*, 117 F.3d 519, 523 (11th Cir. 1997) ("Distinguishing a prior precedent that is being overruled would make as much sense as pruning a plant that is being dug up and discarded.").

1. *A Union May Not Waive An Individual's Substantive Or Procedural Rights Under Federal Antidiscrimination Statutes.* The most significant distinction between *Alexander* and *Gilmer* is that in *Alexander* the arbitration clause was found in a collective bargaining agreement, while in *Gilmer* it was found in an individual contract. In distinguishing *Alexander*, the Court in *Gilmer* explained that "because the arbitration in [*Alexander* and its progeny] occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings." *Gilmer*, 500 U.S. at 35. The Court explained that "[a]n important concern therefore [in *Alexander*] was the tension between collective representation and individual statutory rights"—which was "a concern not applicable to [*Gilmer*]." *Ibid.* That tension affects both the initial agreement by the union to a particular arbitration procedure in the collective bargaining agreement, and the processing of grievances within that procedure when they arise.

a. *Contract Negotiations.* Under the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, a union may be selected as the exclusive agent for its members in dealing with the employer. Acting in that role in contract negotiations with the employer, the union may waive a wide variety of rights, in order to obtain a better deal with the employer. For example, a union may waive a member's

"right to strike during the contract term, and his right to refuse to cross a lawful picket line," *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); see also *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 280 (1956), even though the employee would retain those rights under the NLRA in the absence of a contractual waiver. See, *e.g.*, 29 U.S.C. 163; *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 233-234 (1963). Similarly, the union may "bind its officials to take affirmative steps to end an unlawful work stoppage," *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 706 (1983), and subject them to distinctive employer-imposed discipline if they fail to do so, even though in the absence of such an agreement the employer could not impose unique disciplinary sanctions on union officials, see *id.* at 702-704. In short, permitting a union to waive many of the rights to engage in concerted activity protected by the NLRA is consistent with the purposes of that statute, and such waivers are honored by the courts and enforced.

There are some rights belonging to bargaining unit members, however, that may not be waived in a collective bargaining agreement. In particular, where permitting waiver of a right in a collective bargaining agreement would create an "inherent conflict" with the statute that created the right, such a waiver is not permitted. *Gilmer*, 500 U.S. at 26. Even under the NLRA, for example, although "a union may bargain away its members' economic rights, * * * it may not surrender rights that impair the employees' choice of their bargaining representative." *Metropolitan Edison*, 460 U.S. at 705-706; see *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325 (1974); *Mastro Plastics*, 350 U.S. at 281-282. That is because such waivers would be inconsistent with the basic premise underlying the NLRA's scheme for collective representation, which "presuppose[s] that the selection of the bargaining representative remains free." *Magnavox*, 415 U.S. at 325 (internal quotation marks omitted).

Similarly, a union may not waive its members' basic rights to a federal judicial forum under federal antidiscrimination statutes, because recognizing such a waiver would be inconsistent with the purposes underlying those statutes. When a union negotiates a collective bargaining agreement, the union's goal is to negotiate an arrangement that maximizes the well-being of the members of the bargaining unit as a group. To accomplish that goal, the union may face difficult choices among competing terms that would benefit different subgroups of its members. But in light of the "differences * * * in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees, * * * [a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953). See also *Air Line Pilots Ass'n* v. *O'Neill*, 499 U.S. 65, 76 (1991) ("wide range of reasonableness" standard applies to contract negotiation).

In particular, when a union negotiates a procedure for resolving disputes through arbitration, the union may face critical choices regarding the shaping of the dispute resolution machinery. The union may, for example, seek to obtain procedures that will provide an exceptional opportunity for members of the bargaining unit to prevail on claims arising from the most common contract violations. For that reason, a union may decide, for example, that particularly short deadlines for filing and resolving claims are appropriate, because ordinary contractual disputes

may be suitable for virtually immediate resolution.[6] The union may reasonably deem inconsequential the fact that those same procedures are not optimal for resolving claims under federal antidiscrimination statutes; even acting in complete good faith and satisfying its duty of fair representation, the union may decide that bargaining unit members are, collectively, likely to be better off with the procedures most suitable to the ordinary run of disputes.

Although that decision by the union may be unexceptionable, it provides no guarantee that each individual who has suffered discrimination under a federal statute will have had an adequate opportunity either to avail himself of the statutory remedial scheme or to decide instead that waiver of that scheme in favor of arbitration is acceptable. Subordinating the interest of each such individual to the collective interests of the bargaining unit members in this way would be inconsistent with the intense focus of federal antidiscrimination statutes on the right of each individual to be free of discrimination. See *Alexander*, 415 U.S. at 51 (Title VII "concerns not majoritarian processes, but an individual's right to equal employment opportunities"). That right does not depend on how other employees are treated or how classes of which the individual may be a member are affected.

For example, in *Connecticut* v. *Teal*, 457 U.S. 440, 453 (1982), this Court rejected the claim that a discriminatory employment practice could be defended on the ground that, at the "bottom line," members of the minority group were nonetheless fairly represented. As the Court explained,

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[6] In this case, the contract provided that, if the union and employer cannot settle a dispute informally, the claim must be submitted in writing to a grievance committee within 48 hours. Pet. App. 15a-16a. Under the ADA, by contrast, the statute of limitations is 180 or 300 days. 42 U.S.C. 12117 (incorporating Title VII's enforcement procedures).

"[t]he principal focus of [Title VII] is the protection of the individual employee," 457 U.S. at 453, and "[e]very *individual* employee is protected" by the statute, *id.* at 455. In *City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), the Court held that Title VII precludes an employer from requiring women to contribute more to its pension fund than men, on the ground that women on average live longer and are thus likely to benefit from the pension program more than men. The Court explained that it was "of critical importance" to its decision that "[t]he statute's focus on the individual is unambiguous," since the employer's policy would result in some individual women, who do not live as long as the average man, receiving smaller paychecks while working and receiving no compensating advantage when they retire. *Id.* at 708. "[T]he basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes." *Id.* at 709.

Subjecting the means of vindicating a discrimination claim to majoritarian decisionmaking by the union is thus inconsistent with that basic policy of Title VII and the other federal antidiscrimination statutes. Accordingly, the inclusion of an exclusive arbitration provision in a collective bargaining agreement cannot waive the rights of each bargaining unit member to take advantage of—or waive, on an individual basis—the full array of remedial mechanisms created by a federal antidiscrimination statute.

b. *Grievance Procedures.* Even if individual employees' judicial remedies under federal antidiscrimination laws could be waived in a collective bargaining agreement, it would be inconsistent with those laws to relegate the employee to an arbitration process that, like most collectively bargained grievance procedures, gives the union control over whether and how to present or com-

promise claims. In such a scheme, there is an inherent conflict between the union's collective responsibilities and the employee's highly individual federal statutory rights.

Under a typical collectively bargained grievance/arbitration procedure—like the one established by the collective bargaining agreement in this case—an individual may not unilaterally obtain binding arbitration of a claim. Instead, the union must decide whether and how the grievance should be pursued or compromised, either in an initial, informal attempt at resolution or in later stages of the process up to and including binding arbitration. See *Barrentine*, 450 U.S. at 742 ("Wage and hour disputes that are subject to arbitration under a collective-bargaining agreement are invariably processed by unions rather than by individual employees."); *Vaca* v. *Sipes*, 386 U.S. 171, 190-193 (1967). The union's control over whether and how a claim is presented to arbitration, however, creates "the tension between collective representation and individual statutory rights," *Gilmer*, 500 U.S. at 35, that was not present in *Gilmer* and that was an important basis for the Court's decision in *Alexander*.

The arbitration procedure in this case exemplifies the problem, because the union, rather than the individual employee, is a party to each stage of the grievance and arbitration procedure. The parties to the collective bargaining agreement are the South Carolina Stevedores Association and its employer members, on the one hand, and the union on the other. J.A. 36a. Indeed, it was undisputed that "[petitioner] is not a party to the Collective Bargaining Agreement." J.A. 55a. Under the agreement, a claim must first be referred to informal efforts at resolution by union and management. If such efforts are unsuccessful, the claim may be reduced to writing within 48 hours and presented to the Port Grievance Committee. Pet. App. 16a; see J.A. 43a. If that committee cannot

resolve the dispute, the union may refer it to a second grievance committee and then, if necessary, to compulsory arbitration. Pet. App. 16a n.1; J.A. 44a. There is no suggestion that, at any stage of the process, the individual employee can control access, determine the manner in which a claim is presented, or dictate minimum terms for settlement. In this case, for example, it appears that petitioner's claim did not proceed beyond the stage of informal resolution because "the union did not pursue the matter." Pet. App. 16a.

There are many legitimate reasons why a union might decline to pursue a claim in a collectively negotiated grievance procedure. The union may believe the claim has no merit; the union may believe that an employer has adequately remedied a claim by instituting new general procedures (even if the individual claimant has not been compensated); or the union may believe that pursuing other grievances more vigorously is in general more in the interest of members of the bargaining unit. See, *e.g.*, *Pryner* v. *Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir.) (noting that, in carrying out its duty of fair representation to its members, a union may take into account such "strategic factors" as "its limited resources and consequent need to establish priorities * * * as well as its desire to maintain harmonious relations among the workers and between them and the employer"), cert. denied, 118 S. Ct. 294 (1997). As in the case of contract negotiation, a union's prosecution of a grievance under the contract is governed not by the union's obligation to each individual member of the bargaining unit, but by the union's collective obligation to the bargaining unit members as a whole. As a result, a "union balancing individual and collective interests might validly permit some employees' statutorily granted * * * benefits to be sacrificed if an alternative expenditure of resources would

result in increased benefits for workers in the bargaining unit as a whole." *Barrentine*, 450 U.S. at 742.

Leaving the prosecution of a statutory antidiscrimination claim in the control of the majoritarian union processes would be inconsistent with the intense focus on each individual's rights under federal antidiscrimination statutes. A union's decision to subordinate some of the individual employee's interests in full enforcement for the benefit of the bargaining unit as a whole would be entirely at odds with Congress's decision that each individual should have the right to attain the promise of equal employment opportunity in the nation's antidiscrimination laws. Accordingly, the union's control over the prosecution and settlement of a grievance in a collective bargaining arbitration procedure provides an additional reason why the existence of such a procedure does not vitiate the individual employee's rights to vindication of statutory antidiscrimination claims in federal court.

2. *Other Distinctions Between* Gilmer *and* Alexander *Also Suggest That This Case Is Controlled By* Alexander. In distinguishing *Alexander*, this Court in *Gilmer* identified two factors, in addition to the tension between individual statutory rights and collective representation, that supported enforcement of the arbitration provision in *Gilmer*. Neither of those factors is present in this case.

a. In *Gilmer*, the employee had agreed to arbitrate statutory claims, while *Alexander* and its progeny "did not involve the issue of the enforceability of an agreement to arbitrate statutory claims." *Gilmer*, 500 U.S. at 35. To the contrary, the Court explained, the employees in *Alexander* "had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims." *Ibid.*

Like the CBA in *Alexander*, the CBA in this case did not purport to cover statutory claims of discrimination.

The collective bargaining agreement provided that it "is intended to cover all matters affecting wages, hours, and other terms and conditions of employment." Pet. App. 4a. It does not state that statutory claims of discrimination are subject to the agreement's grievance and arbitration procedures, and there is no basis to infer that the parties intended that statutory claims should be subject to the contractual dispute resolution process. Like the CBA in *Gardner-Denver*, the CBA's arbitration provision reaches "only questions of contractual rights."[7] 415 U.S. at 53-54.

The court of appeals ruled that the language in the CBA was sufficient to encompass petitioner's ADA claim because the language was similar in scope to the arbitration language before this Court in *Gilmer*. Pet. App. 4a. That misses the point entirely. The agreement in *Gilmer* was an agreement between an *individual* and a securities exchange. In that context, it may be proper to view an agreement to arbitrate "[a]ny controversy * * * arising out of the employment or termination of employment" as embracing the individual's statutory claim of employment discrimination. 500 U.S. at 23. No such assumption can be made in the context of a collective bargaining agreement, where there is a long history of viewing the grievance and arbitration procedures as limited to the interpretation and application of the contractual rights embodied in the CBA. See *Alexander*, 415 U.S. at 49-54; cf. *Livadas* v.

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[7] The CBA contains a provision stating that "[i]t is the intention and purpose of all the parties hereto that no provision or part of this Agreement shall be violative of any Federal or State law." Pet. App. 17a. That provision, however, merely states that the parties are to carry out the agreement in a manner that does not violate the law. It does not obligate the union to pursue claims of statutory discrimination on behalf of a member and in no way suggests that the agreement's grievance and arbitration framework is an appropriate forum for resolving statutory claims of discrimination.

Bradshaw, 512 U.S. 107, 125 (1994) ("arbitration pledge" in CBA could not reasonably be understood as covering an individual's "state-law claims"); *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409-10 n.9 (1988) (CBA is not construed as applying to an individual's statutory rights absent "clear and unmistakable evidence" that the parties to the agreement so intended) (quoting *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 708 (1983)).

b. The arbitration contract in *Gilmer* was governed by the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq*. See 500 U.S. at 25 & n.2. The Court therefore applied the Act's "liberal federal policy favoring arbitration agreements," *id.* at 25, and the Court specifically distinguished *Alexander* and its progeny on the ground that "those cases were not decided under the FAA." *Id.* at 35.

In this case, as in *Alexander*, the collective bargaining agreement falls outside the FAA. It is widely understood that CBAs are excluded from the FAA as "contracts of employment" within the meaning of 9 U.S.C. 1.[8] See, *e.g.*, *Herring* v. *Delta Airlines, Inc.*, 894 F.2d 1020, 1023 (9th Cir.), cert. denied, 494 U.S. 1016 (1990); *Domino Sugar Corp.* v. *Sugar Workers Local Union 392*, 10 F.3d 1064, 1067 (4th Cir. 1993); *United Food & Commercial Workers* v. *Safeway Stores, Inc.*, 889 F.2d 940, 943-44 (10th Cir. 1989); *Lincoln Mills* v. *Textile Workers Union of America*, 230 F.2d 81, 86 (5th Cir. 1956), rev'd on other grounds, 353 U.S. 448 (1957); *Gatliff Coal Co.* v. *Cox*, 142 F.2d 876, 882 (6th Cir. 1944); see also *United Paperworkers Int'l Union* v. *Misco*, 484 U.S. 29, 40 n.9 (1987) (noting that the FAA did not apply to the arbitration

[8] Section 1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in * * * interstate commerce." 9 U.S.C. 1.

agreement at issue since the FAA "does not apply to 'contracts of employment of * * * workers engaged in foreign or interstate commerce' ").[9] The CBA in this case thus falls within the scope of the Section 1 exclusion and is therefore not subject to the "federal policy favoring arbitration" under the FAA invoked in *Gilmer*.

The Fourth Circuit in *Austin* acknowledged that CBAs are within the Section 1 exclusion, but nonetheless concluded that "the federal labor policy encouraging arbitration of labor disputes as expressed in the *Steelworkers Trilogy*" was sufficient to require arbitration of an anti-discrimination claim. 78 F.3d at 883 n.2. That view is mistaken. The *Steelworkers Trilogy* was decided prior to *Alexander*. After citing and discussing the *Trilogy*, the Court in *Alexander* concluded that the *Trilogy* "does not establish that an arbitrator's resolution of a contractual claim is dispositive of a statutory claim under Title VII." 415 U.S. at 46 n.6. The same conclusion follows here.

[9] A number of courts have taken the view, outside the context of collective bargaining agreements, that the Section 1 exclusion applies only to the contracts of workers who are directly involved in the transportation of goods in interstate commerce. See, *e.g.*, *Great Western Mortgage Corp.* v. *Peacock*, 110 F.3d 222, 227 (3d Cir.), cert. denied, 118 S. Ct. 299 (1997); *Rojas* v. *TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996). The better view of the exclusion is that it broadly covers all employment contracts otherwise subject to the reach of the Act. See *Gilmer*, 500 U.S. at 39-41 (Stevens, J., dissenting); Matthew W. Finkin, *"Workers' Contracts" Under The United States Arbitration Act: An Essay In Historical Clarification*, 17 Berkeley J. Empl. & Lab. L. 282 (1996). In any event, this case involves an agreement that covers workers whose very job is to help move goods in interstate commerce. The CBA thus falls outside the FAA, even under the most narrow view of the Section 1 exclusion.

C. Provisions In Federal Antidiscrimination Statutes Encouraging Knowing And Voluntary Use Of Alternative Means Of Dispute Resolution Do Not Authorize Use Of Such Means Where A Union—But Not The Claimant—Has Purportedly Agreed To Waive Statutory Judicial Remedies

In reaching the conclusion that this Court's decision in *Alexander* no longer precludes a union from waiving an employee's remedies under federal antidiscrimination statutes, the Fourth Circuit in *Austin* relied heavily on provisions of Title VII and the ADA stating that:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including * * * arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1081 (Title VII); see also 42 U.S.C. 12212 (ADA). See *Austin*, 78 F.3d at 881. The court of appeals repeatedly referred to that provision in justifying its decision that a general arbitration clause in a collective bargaining agreement bars an employee covered by the contract from filing a lawsuit under a federal anti-discrimination statute.

1. The language on which the Fourth Circuit relied does not support its conclusion that Congress intended to permit waiver of statutory antidiscrimination rights in collective bargaining agreements. At the time Congress acted, it had been clear at least since *Alexander* was decided that arbitration was not "authorized by law" simply because a collective bargaining agreement purported to establish arbitration as an exclusive means for resolving employment-related disputes. Accordingly, al-

though the cited statutory provisions do in terms "encourage" arbitration or other means of alternative dispute resolution where the parties to the dispute—the employer and the individual employee—have knowingly and voluntarily agreed to pursue those means, the provisions do not support the Fourth Circuit's conclusion that arbitration should be imposed where the employee has never expressly agreed to substitute arbitration for a federal judicial remedy.[10]

2. The legislative history of the provisions makes it quite clear that Congress intended to encourage arbitration only where an individual voluntarily chooses to submit his claim to arbitration in the context of an existing dispute or claim. As the Conference Report on the ADA states: "It is the intent of the conferees that the use of the alternative dispute resolution procedures is completely voluntary. Under no condition would an arbitration clause in a *collective bargaining agreement or employment contract* prevent an individual from pursuing

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[10] The Court in *Gilmer* recognized that courts should be careful to enforce only free and voluntary agreements to arbitrate antidiscrimination claims. See *Gilmer*, 500 U.S. at 33 (referring to employee's status as "an experienced businessman" and noting that there was "no indication" that he "was coerced or defrauded into agreeing to the arbitration clause"). The Court cautioned that "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." *Ibid.* (internal quotation marks omitted). And, by stating that any "claim of unequal bargaining power is best left for resolution in specific cases," *ibid.*, the Court necessarily suggested that there may be cases in which there is such inequality between employer and employee that an agreement to arbitrate—even by an individual employee—would not be enforceable.

their rights under the ADA." H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990).[11]

The report of the House Committee of the Judiciary further elucidates Congress' intent with respect to the use of arbitration. The Report again states that arbitration, when required under a collective bargaining or employment agreement does not preclude an individual from pursuing his statutory claim in court under the enforcement provisions of the ADA:

> The Committee wishes to emphasize * * * that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by this Act. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, *whether in the context of a collective bargaining agreement or in an employment contract*, does not preclude the affected person from seeking relief under the enforcement provisions of this Act. This view is consistent with the Supreme Court's interpretation of title VII of the Civil Rights Act of 1964, whose remedial provisions are incorporated in [the ADA]. The Committee believes that the approach articulated by the Supreme Court in *Alexander v. Gardner-Denver Co.* applies equally to the ADA and does not intend that the inclusion of [the section on alternative dispute resolution] be used to preclude rights and remedies that would otherwise be available to persons with disabilities.

H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 3, at 76-77 (1990) (emphasis added); see *LaChance* v. *Northeast Pub.*,

[11] Because the agreement to arbitrate in *Gilmer* was not made in the context of an employment contract, see 500 U.S. at 25 n.2, this statement is consistent with the Court's decision in *Gilmer* one year later.

Inc., 965 F. Supp. 177, 187 (D. Mass. 1997) (Though "Congress wanted to encourage arbitration of ADA claims, it also clearly intended that aggrieved individuals retain the right to pursue a claim in a judicial forum.").

Congress expressed the same view in the Civil Rights Act of 1991 (CRA), enacted just one year after the ADA. In Section 118 of the CRA, Congress addressed the issue of arbitration with respect to "the Acts or provisions of Federal law amended by this title" (which included Title VII, the ADA, and the ADEA). See § 118, 105 Stat. 1081 (42 U.S.C. 1981 note). Congress again stated that it "encouraged" the "use of alternative means of dispute resolution," including arbitration, but only "[w]here appropriate and to the extent authorized by law." *Ibid.*[12] As with the ADA, the Committee Report stated:

> The Committee emphasizes * * * that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of

[12] In commenting on Section 118, the Act's sponsors emphasized that only a knowing and voluntary agreement to arbitrate would be enforceable. See 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards) (arbitration provision of CRA "contemplates the use of voluntary arbitration to resolve specific disputes *after they have arisen*, not coercive attempts to force employees in advance to forego statutory rights") (emphasis added); 137 Cong. Rec. S15,478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole) (arbitration is encouraged only "where the parties knowingly and voluntarily elect to use these methods").

> Title VII in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). The Committee does not intend this section to be used to preclude rights and remedies that would otherwise be available.

H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1, at 97 (1991).[13]

In short, far from attempting to limit or alter the settled understanding that derived from this Court's decision in *Alexander*, Congress sought to encourage arbitration in cases in which the individual employee and employer both determined that arbitration was an appropriate dispute resolution mechanism. Neither the language of the cited amendments nor their purposes would

[13] Congress has made explicit that procedural rights under the ADEA may not be waived in any pre-dispute agreement—even in an individual contract. The Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, § 202, 104 Stat. 984, provides minimal standards for determining when a waiver of "*any* right or claim under [the ADEA]," 29 U.S.C. 626(f)(1) (emphasis added), is "knowing and voluntary" and, thus, enforceable. See *Gilmer*, 500 U.S. at 28 n.3. A waiver is not considered knowing and voluntary if the individual waives "rights or claims that may arise after the date the waiver is executed." 29 U.S.C. 626(f)(1)(C). The OWBPA extends to the waiver of the right to a de novo (jury) trial in district court. See 29 U.S.C. 626(c); accord S. Rep. No. 79, 101st Cong., 1st Sess. 13 (1989) (stating that the OWBPA was needed, in part, to ensure that individuals would not be forced into ceding away such procedural "protections" as the right to a jury trial), incorporated by reference in S. Rep. No. 263, 101st Cong., 2d Sess. 15 (1990); H.R. Rep. No. 664, 101st Cong., 2d Sess. 24 (1990) (same); see also S. Rep. No. 79, *supra*, at 9 (citing congressional concern with the "preemptive waiver of rights [that] occurs before a dispute has arisen and indeed before an employee is even aware of any potential or actual pattern of discrimination"). The OWBPA did not govern the arbitration agreement in *Gilmer* because the claim in that case arose prior to the enactment of the OWBPA. See § 202, 104 Stat. 984 (stating that the waiver provisions of the OWBPA "shall not apply with respect to waivers that occur before the date of enactment of this Act").

be consistent with requiring arbitration of such disputes, and precluding an employee from invoking a statutory federal judicial remedy, in a case in which the individual employee had never made such a determination.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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